



POLICE DEPARTMENT

December 7, 2022

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In the Matter of the Charges and Specifications :

- against - :

Lieutenant Michael Butler :

Tax Registry No. 948725 :

Chief of Department :

Case No.

2021-23571

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Brian Arthur, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: James Moschella, Esq.
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To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Lieutenant Michael Butler, on or about May 30, 2020, at approximately 1732 hours, while assigned to CD OFF and on duty, in the vicinity of Bedford Avenue and Tilden Avenue, Kings County, wrongfully used force, in that he pushed an unknown individual without police necessity. *(As amended)*

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

2. Lieutenant Michael Butler, on or about May 30, 2020, at approximately 2030 hours, while assigned to CD OFF and on duty, in the vicinity of Bedford Avenue and Tilden Avenue, Kings County, wrongfully used force, in that he pulled an individual down to the ground without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 4, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The identities of Individuals A and B are unknown to the CCRB; therefore, they were not called to testify at trial. Instead, CCRB relied on video recordings of the incidents: the first is a cell phone recording taken at street level, which was posted on a Twitter account (CCRB Ex. 1); the second is also a cell phone recording taken at street level posted on a different Twitter account. (CCRB Ex. 4) Respondent called Deputy Chief Charles McEvoy and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, I find Respondent Not Guilty of the charged misconduct.

ANALYSIS

It is undisputed that from late May to early June 2020, New York City was in the midst of the George Floyd protests. In this case, the CCRB alleges that, during those protests,

Respondent used force against two unknown individuals without police necessity. At trial, Respondent readily admitted that he pushed Individual A and that he brought Individual B to the ground. Accordingly, the sole issue before this tribunal is whether the force used was reasonable under these circumstances. For the reasons set forth below, I find that it was.

The Patrol Guide sets forth the parameters for determining whether the use of force is authorized. P.G. 221-01 and 221-02 state that force may be used to ensure the safety of the MOS or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape. The force used must be "only the reasonable force necessary" under the circumstances.

Legal precedent establishes that the reasonableness of an officer's actions must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Koeiman v. City of New York*, 36 A.D.3d 451 (1st Dept. 2007), citing *Passino v. State*, 260 A.D.2d 915 (3d Dept. 1999). Furthermore, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396- 97 (1989).

Specification 1: Pushed an unknown individual

It is uncontested that from May 29 to May 30, 2020, Respondent was assigned to the Chief of the Department's Office, under the direction of Chief Charles McEvoy. On the morning of May 30, 2020, he responded to Parkside Avenue along Prospect Park in Brooklyn because the Department had intelligence that there was going to be a large demonstration at that location.

Respondent estimated that he observed over a thousand people in the Park. Participants chanted and then began to march as officers monitored and walked alongside. (Tr. 56-58)

At one point, a group splintered off and started marching towards the 67 Precinct. Respondent headed toward that Precinct after reports that the group had become violent. However, they changed their trajectory when a 10-13 "all-hands" came over the radio requesting urgent assistance. Respondent described the call as follows:

In my 12 years on this job, I never heard a transmission of that severity. I have worked with police officers shot in the line of duty. I've responded to large scale murders, never once have I never heard screaming like that over a radio. At that point, you know, we knew we had to respond (Tr. 61)

Respondent testified that the distress call came from the Commanding Officer of the 71 Precinct, Inspector Romero. During the last transmission Respondent heard, the Inspector yell, "This might be my last transmission." Chief Charles McEvoy confirmed the particulars of this urgent call. Respondent immediately began running towards Bedford and Tilden Avenues, convinced that the Inspector's life was in danger. (Tr. 37, 59-62, 68, 80)

Respondent testified that at the scene, he observed over a thousand individuals spilling out onto the streets. He was unable to locate the Inspector to ascertain his safety so the officers started to make their way through the crowd. As the officers gave orders for participants to disperse, most moved out of the way. Respondent testified that, "the last line...decided to lock arms and tell me that I'm not getting through." Respondent shoved Individual A out of the way, allowing other officers to continue through to locate Inspector Romero. Individual A was arrested for obstructing governmental administration. (Tr. 43, 63-64, 67)

Respondent's credible and uncontested account was corroborated by the video recording admitted into evidence as CCRB Ex. 1. The short video captured Respondent wearing a blue shirt as he moved through the crowd with several other high-ranking officers. Respondent is first

seen with a radio to his ear, before he starts to rush with a sense of urgency. Most of the crowd disperses before they reach a line of protestors with their arms locked, forming a human chain next to a marked police car. The second person in the chain is Individual A. He is wearing a black t-shirt and a grey backpack and is seen locking arms with another person who is wearing a patterned sweater and a helmet. Respondent attempts to gain access through the chain by shoving Individual A. Another officer is seen running passed the crowd at a sprint, as Individual A is handcuffed. (CCRB Ex. 1)

The evidence presented at trial failed to establish that, under these particular circumstances, the force used constituted sanctionable misconduct. The short video clip posted on Twitter that CCRB relied upon tells part of the story. However, the clip by itself, capturing just 45 seconds in isolation, is devoid of the context needed to appropriately and fully assess officer conduct. Unfortunately, Individual A was never identified; thus neither the CCRB nor this tribunal had an opportunity to hear his version of events. Had Individual A provided a statement, it may have contained important information that could have impacted the required legal analysis. Nevertheless, in this case, the video supports key aspects of Respondent's account and, in the absence of any opposing evidence, buttresses rather than undercuts his position.

More importantly, this tribunal found Respondent to be a straightforward and credible witness. Respondent's account expressing his earnest concern for the safety of a fellow officer confronting a dire situation was corroborated by the testimony of Chief McEvoy, as well as the actual recording of Inspector Romero's urgent call requesting the "10-13," where dozens of officers were redeployed to assist. (CCRB Ex. 2) This tribunal also credited Respondent's uncontested account that, while others followed their orders and allowed him to pass, Individual A responded by yelling that the officers would not get through and locking arms with others to

physically stop them. In fact, the video footage shows much of the crowd allowing the officers to go through. Using a push, which was limited in scope and duration, to break a human chain purposely formed to stop them, was reasonable force given their real fear that another officer was in danger. Accordingly, I find Respondent Not Guilty of the misconduct alleged in Specification 1.

Specification 2: Pulled an individual down to the ground

It is uncontested that Respondent remained in the area of Bedford and Tilden Avenues throughout the rest of that day and assisted in multiple arrests. He recounted that on May 30, segments of the crowd became increasingly violent and engaged in criminal activity such as setting police vehicles on fire and overtaking MTA buses. Others threw bricks and bottles at officers, while others punched or hit them with other objects. At one point, Respondent witnessed Chief McEvoy being hit with a brick, which caused him to lose feeling in his arm. (Tr. 48-49, 72-73)

Respondent credibly testified that unidentified Individual B struck a Police Chief with his fist. Thereafter, in the midst of a large scale disturbance with numerous officers simultaneously struggling with the crowd, several officers attempted to arrest Individual B for assaulting a police officer. Respondent testified that Individual B was noncompliant and refused to be handcuffed. The arresting officers moved with Individual B approximately 30 feet from scene of the assault, but Individual B continued to flail his arms as the officers unsuccessfully tried to gain control. Based on his observations, Respondent made a determination that to safely handcuff Individual B, he had to be brought to the ground. Respondent convincingly stated that he assisted in the arrest by grabbing Individual B's backpack with one hand and pushing down on his torso with the other. Once on the ground, Individual B was handcuffed. (Tr. 74-77)

CCRB relied primarily on a short video clip posted on Twitter to prove its case. The video captures a number of officers in riot gear as the crowd gathers on the street and surrounding areas. At 0:06 seconds, an officer is seen laying on the ground. At 0:13 seconds, a group of two officers and a supervisor in riot gear approach from the right side of the screen, holding an individual in a grey shirt and face mask, later identified as Individual B. The officers are seen struggling for over five seconds as they attempt to control him. Individual B is not handcuffed as they walk through the unpredictable crowd. He is swinging his arms and pulling his body away from the officers. The video captures Respondent as he steps up from behind, grabs the low hanging backpack with one hand, places his other arm across Individual B's shoulders, and pulls him to the ground where he is handcuffed. It is only then that the officers were able to gain control of Individual B. (CCRB Ex. 4 at 0:14-0:19)

Under these specific circumstances, the tribunal finds that Respondent's actions were objectively reasonable. As noted above, viewing an isolated moment on video does not always provide the context required by applicable legal standards; particularly when the subject does not provide a statement. Here, the record contains Respondent's sworn testimony explaining what motivated his intervention in this particular arrest. Respondent credibly testified that Individual B was not handcuffed as the officers tried to control him in the midst of a chaotic and hostile situation. As noted by Respondent, not only are his arms noticeably flailing, but the length traveled while not fully in police control, created a safety concern and possible flight risk that necessitated immediate action. Respondent's takedown of this resisting felony arrestee, which took place as other officers were being assaulted, does not amount to sanctionable misconduct.¹ Accordingly, I find Respondent Not Guilty of the misconduct alleged in Specification 2.

¹ In making this finding, I note that the outcome here could have been different under less dire circumstances. Given the facts of this case, however, the conduct at issue does not amount to a Patrol Guide violation.

Respectfully submitted,

By JJA
/s/ Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

[Signature]
MAY 23 2023
KECHANT L. SEWELL
POLICE COMMISSIONER